80-5065

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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IN RE: ESTATE OF HELEN JEROKOVITCH, DECEASED :

APPEAL OF GEORGE JEROKOVITCH, JR., :No. October Term, 1980

PROPONENT :

Supreme Court U.S.
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APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA - WESTERN DISTRICT

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF PENNSYLVANIA - WESTERN DISTRICT

IN RE: ESTATE OF HELEN JEROKOVITCH, DECEASED	:	
APPEAL OF GEORGE JEROKOVITCH, JR., PROPONENT	:	No. 104 March Term, 1979

JURISDICTIONAL STATEMENT

a.) Statement of questions involved:

1. Does the requirement of 20 P.S. §2502 (2) requiring that a testator who signs his name with a mark must have his name subscribed upon the Will in his presence violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

2. Is the Due Process Clause of the Fourteenth Amendment violated because 20 P.S. §2502 (2) creates an irrebuttable presumption that a testator's will is invalid when his signature is not subscribed in his presence before or after the will is signed by mark?

3. Does the Clause in 20 P.S. §2502 (2) which requires that a testator's name be subscribed in his presence before or after he makes his mark where he signs his will with a mark violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because it is too vague and fails to put a testator on notice of its intended meaning?

b.) Parties to this action:

1. The appellant in this case is George Jerokovitch, Jr. The appellees in this case are Catherine Riccuiti and Margaret Roncadori.

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d.) Opinions and Orders from lower Courts:

1. An Opinion and Order of the Court of Common Pleas of Washington County was handed down on July 6, 1979 and is published at 60 Washington County Reports 25 (1979), a copy of which Opinion and Order are attached hereto as Exhibit "A". A Judgment and Opinion of the Supreme Court of Western Pennsylvania, as yet unpublished, was handed down on April 11, 1980, a copy of this Judgment and Opinion is attached hereto as Exhibit "B".

e.) Grounds upon which the jurisdiction is invoked:

The nature of this proceeding is a will contest. It involves the filing of a formal caveat by the appellees to the will of Helen Jerokovitch, based upon the claim that the formation of the will did not conform with §2502 (2) of the Decedents, Estates and Fiduciaries Code, 1972, June 30, P.L. 508, No. 164, §2, eff. July 1, 1972 as amended 1974, Dec. 10, P.L. 525, No. 293, §6, ind. effective, 20 Pa. C.S.A. §2502 (2) on the grounds that the will was signed by the testatrix with a mark, but the testatrix's name was not subscribed in her presence. The appellant has challenged the constitutionality of this requirement on all judicial levels on the basis that this requirement violates the Due Process and Equal Protection Clauses of the Constitution of the United States of America.

The Supreme Court of the United States has jurisdiction of this appeal under 28 U.S.C. § 1257 (2) because the validity of a statute of Pennsylvania is being challenged on the ground of its being repugnant to the Constitution of the United States and the decision appealed from is in favor of validity.

ii.) The judgment sought to be reviewed was entered on April 11, 1980. There was no notice for re-hearing. The notice of appeal was filed on May 13, 1980 in the Supreme Court of Pennsylvania , Western District.

iii.) 28 U.S.C. §1257 (2) confers jurisdiction upon the Supreme Court of the United States to hear this appeal.

Cases believed to sustain the jurisdiction are:

Standard Oil Co. of California v. Johnson, Cal. 1942, 62 S. Ct. 1168, 316 U.S. 481, 86 L. Ed. 1161.

Hamilton v. Regents of the University of California, Cal. 1932, 55 S. Ct. 197, 293 U.S. 245, 79 L. Ed. 343, re-hearing denied 55 S. Ct. 345, 293 U.S. 633, 79 L. Ed. 717.

Red Cross Line v. Atlantic Fruit Co., N.Y. 1924, 44 S. Ct. 274, 264 U.S. 109, 68 L. Ed. 582.

f.) Text of the Constitutional Provisions involved:

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Text of the statute involved:

§2502. Form and execution of a will:

Every will shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:

(2) Signature by mark. If the testator is unable to sign his name for any reason, a will to whch he makes his mark and to which his name is subscribed in his presence before or after he makes his mark, shall be valid as though he had signed his name thereto: Provided, that he makes his mark in the presence of two witnesses who sign their names to the will in his presence.

...

1972 June 20, P.L. 508, No. 164, §2, eff. July 1, 1972. As amended 1974, Dec. 10, P.L. 525, No. 293, §6, ind. effective.

g.) Statement of the case:

On June 10, 1965 Helen Jerokovitch, an illiterate person, listened to her will being read to her in front of two disinterested witnesses. At the end of the reading the testatrix said "That's what I want", and placed her mark above her name at the end of the will.

On June 14, 1977 Helen Jerokovitch died. On February 2, 1978 the appellees Catherine Riccuiti and Margaret Roncadori filed an Informal Caveat to Helen Jerokovitch's will, challenging its authenticity and qualification as a testamentary instrument. On March 21, 1978, appellees filed a Formal Caveat to the will including in their objections a statement that the will did not conform with 20 P.S. §2502 (2) because the testator's name was not subscribed in her presence at the time she signed her will with a mark.

By Opinion and Order dated July 6, 1979 Judge Samuel L. Rodgers of the Court of Common Pleas of Washington County upheld appellees' caveat and ruled the will to be invalid on the basis that the will had not been executed in conformance with 20 P.S. §2502 (2), but did not address himself to the other issues raised in the Caveat. The Supreme Court of Pennsylvania - Western District affirmed the lower court's order on April 11, 1980.

The federal questions involved in this case were first raised at the initial hearing before Judge Rodgers on September 20, 1978 and were initially raised in the pleadings in an Amendment to the Answer to the Caveat. The federal questions were not raised in the original Answer to the Caveat because attorneys, Shire and Bergstein were not retained by the appellant until after the original Answer had been filed. The federal questions were again raised by the appellant on his appeal to the Supreme Court of Pennsylvania

The rulings of both the Court of Common Pleas of Washington County and the Supreme Court of Pennsylvania were both concerned solely with the federal issues involved in this case, and the courts ruled against the appellant on all of these issues. Thus, these rulings were of a nature to bring this case within the statutory provision believed to confer jurisdiction upon the Supreme Court of the United States.

h.) Statement of why federal questions involved are substantial:

The federal questions raised in this appeal are so substantial as to require plenary consideration by the Supreme Court of the United States. The requirement of 20 P.S. §2502 (2) that the testator's name must be subscribed to the will in her presence at the time she affixes her mark to the will is totally unrelated to the proported goal of preventing the testator from falling victim to fraud.

There are three federal questions involved in this case. First, the requirement of having a testator having his name subscribed to his will by another person in his presence only applies to illiterate testators and this, irrational requirement applies only to one group of persons (illiterates). Therefore, does this unequal treatment constitute a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States? Second, this requirement creates an irrebuttable presumption that a testator's will is not worthy of consideration as a will if his signature is not subscribed in his presence before or after the will is signed by mark. Does this irrebuttable presumption violate the Due Process Clause of the Fourteenth Amendment of the United States? Third, the clause in 20 P.S. §2502 (2) can be interpreted in a number of ways. Does this clause violate the Due Process

of the Fourteenth Amendment to the Constitution of the United States because it is too vague and fails to put a testator on notice of its intended meaning?

There are a number of elements in the federal questions involved in this case which make them so substantial as to require plenary consideration by the Supreme Court. First of all, this case involves the right to give and receive property through testation, a right which has been recognized as having constitutional interest (See Trimble v. Gordon, 401 U.S. 12, 97 S. Ct. 1459, 32 L. Ed . 2d 101 (1977)). Furthermore, the problem that is dealt with in this case, that is, the problem of an otherwise valid will being excluded because of this requirement, is a problem which has lead to the exclusion of a large number of wills throughout this clause's history. This fact is evident in the large number of cases in Pennsylvania which have excluded wills because of this requirement (See Rhodes Will, 399 Pa. 476, 160 A2d 532 (1960), Torhan Will, 401 Pa. 520, 164 A2d 923 (1960), Orlady v. Orlady, 336 Pa. 369, 9 A2d 539 (1940), Brophy's Estate, 75 D. & C. 2d, 636 (1976), In Re: Hunter's Estate, 328 Pa. 484, 196 A. 35 (1937), Kelly's Estate, 306 Pa. 551, 160 A. 454 (1932), In Re: Cohen's Estate, 356 Pa. 161, 51 A.2d 704 (1947), Criscillo's Estate 130 D. & C. 2d, 314 (1930), and Marcovitch's Estate 43 Sch. L.R. 216 (1948). In the most recent case involving this clause, Brophy's Estate, 75 D. & C. 2d, 636 (1976), the court noted the arbitrariness and lack of logical justification for this clause, but noted that it was beyond a Common Pleas Court's power to change this requirement. Furthermore, this arbitrary requirement effects only a classification of people which has a disproportionate number of persons within it which belong to groups which have been determined to be suspect classification in equal protection analysis. Thus, because of the constitutional interest in the right effected, the number of people that this arbitrary requirement effects and the kind of people that this arbitrary

requirement effects, the question involved in this appeal is so substantial as to require plenary consideration, briefs on the merits and oral arguments for the resolution.

A copy of the Opinions delivered upon the rendering of the prior judgments are attached hereto as Exhibits "A" and "B".

There is appended to this statement a copy of the judgments and decrees rendered in this case attached hereto as Exhibits "A" and "B".

A copy of the notice of appeal filed in the Court of Common Pleas of Washington County filed on May 9, 1980 is attached hereto as Exhibit "C".

Respectfully submitted;

BY: Bernard S. Shire

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PROOF OF SERVICE

I, BERNARD S. SHIRE, an attorney in the office of Messrs Shire & Bergstein, attorneys of record for George Jerokovitch, Jr., Appellant herein, deposes and says that on the 10 day of July, 1980, I served a copy of the foregoing Jurisdictional Statement to the Supreme Court of the United States on Lawrence Barth, Deputy Attorney General, office of the Attorney General, Eastern Regional Office, Room 206, State Office Building, Philadelphia, Pennsylvania 19130 by first class mail in the offices of the Attorney General, which office joined in the Brief of the Appellees, Catherine Riccuiti and Margaret Roncador.

SHIRE & BERGSTEIN

BY: Bernard S. Shire

SUBSCRIBED and sworn to before me, at the offices of Shire & Bergstein, 409 Schoonmaker Avenue, Monessen, Pa. 15062 this 10 day of July, 1980.

Inez Gilotty

NOTARY PUBLIC
INEZ GILOTTY, Notary Public
Monessen, Westmoreland Co., Pa.
My Commission Expires June 13, 1983

PROOF OF SERVICE

I, BERNARD S. SHIRE, an attorney in the office of Messers Shire & Bergstein, Attorneys of record for George Jerokovitch, Jr., Appellant herein, deposes and says that on the 10 day of July, 1980, I served a copy of the foregoing Jurisdictional Statement to the Supreme Court of the United States on Catherine Riccuiti and Margaret Roncadori, Appellees herein, by first class mail to the offices of Janet Moschetta and James Moschetta, Counsel of record for Catherine Riccuiti and Margaret Roncadori, located at 78 East Beau Street, Washington, Penna. 15301.

SHIRE & BERGSTEIN

BY: Bernard S. Shire

SUBSCRIBED and sworn to before me, at the offices of Shire & Bergstein, 409 Schoonmaker Avenue, Monessen, Pa. 15062 this 10 day of July, 1980.

Inez Gilotty

NOTARY PUBLIC
INEZ GILOTTY, Notary Public
Monessen, Westmoreland Co., Pa.
My Commission Expires June 13, 1983

IN RE: ESTATE OF HELEN JEROKOVITCH, DEC'D.

DECEDENTS' ESTATES — WILLS — EXECUTION BY MARK — ADDITIONAL REQUIREMENT NAME BE SUBSCRIBED IN PRESENCE OF TESTATOR — CAVEAT FILED — CONSTITUTIONAL LAW — DUE PROCESS — WILL BASED ON STATUTORY, NOT NATURAL RIGHT — EQUAL PROTECTION — EXTRA PROTECTION FOR TESTATOR UNABLE TO SIGN NAME — REASONABLE CLASSIFICATION. ACT OF JUNE 30, 1972, P. L. 508, NO. 164, SEC. 2, AS AMENDED (20 PA, C.S.A. 2502(2)).

Decedent's daughters have filed a caveat challenging their mother's will which left her estate to a brother. The will, prepared by a magistrate, was signed by testatrix by an "X" and witnessed by two witnesses. The caveat asserts the will was not subscribed with testatrix's name in her presence. Proponent argues such a statutory provision is unconstitutional as violative of due process and equal protection in that it discriminates against illiterates by imposing a further requirement than those to which persons signing their names are subject. HELD, caveat sustained and will ruled invalid.

Where the signature to a will is by mark, but the testator's name has not been subscribed in his presence, the will is invalid.

The right to make a will or to transmit or receive property by will is not a natural right. It is purely statutory.

The requirement that a person subscribing by mark must have his name subscribed in his presence is a reasonable measure to safeguard the authenticity of the execution and does not represent an unreasonable classification, even though the rule differs for persons (presumably literate) who sign their own names.

Caveat to Probate of a Will. No. 63-77-243

Bernard S. Shiro and Joseph E. Fieschko, of firm of Shiro, Bergstein & Caruso, for Proponent.
James A. Moschetta and Janet Moschetta for Contestants.

OPINION AND ORDER OF COURT

Samuel L. Rodgers, J.

July 6, 1979.

Helen Jerokovitch, a widow, died on January 14, 1977, at age 88, a resident of Centerville Borough, Washington County, Pennsylvania, leaving to survive her a son, George Jerokovitch, Jr., and two daughters, Margaret Roncadori and Katherine Ricciuti. The major asset of her estate is a 75 acre farm with dwelling house situate on Route 88 in Centerville Borough.

Upon her death, her son produced a will dated June 10, 1965, allegedly executed by decedent's mark, which gave all of her estate to her spouse and then to her son, if her spouse predeceased her. The decedent's two daughters filed an informal caveat against the probate of this will, and later filed a formal caveat and applied for the issuance of letters of administration. The formal caveat alleged invalid execution of the will and undue influence. An answer was filed by the proponent, George Jerokovich, Jr., denying these allegations.

The decedent's will was prepared by a local magistrate on a printed form with the contents, including the name of the decedent, typed by the magistrate in his office several days prior to the execution by mark. The magistrate, on June 10, 1965, took the decedent's will, along with the will of her husband, which contained similar provisions, to the decedent's home. Present at the time the decedent affixed her mark were two subscribing witnesses, since deceased, the magistrate, her husband, George, Sr., and her son, George, Jr.

At the execution of the will (respondent's exhibit "A"), the numeral "10" was inserted, Helen Jerokovich made her mark in ink in the form of a cross, and the two subscribing witnesses signed their names under the attestation clause. It is undisputed that, the four places on the will where Helen Jerokovich's name appears, her name was typed on the document at the magistrate's office when she was not present, and that her name was not subscribed to this will in her presence.

Section 2502(2) of the Probate Estates and Fiduciaries Code, 20 Pa. C.S.A. 2502(2), provides:

> "(2) Signature by mark. If the testator is unable to sign his name for any reason, a will to which he makes his mark and to which his name is subscribed in his presence before or after he makes his mark, shall be as valid as though he had signed his name thereto: Provided, That he makes his mark in the presence of two witnesses who sign their names to the will in his presence."

Where the signature has been by mark, but the testator's name has not been subscribed in his presence, the courts have uniformly held that the will is invalid. **Hunter's Estate**, 328 Pa. 484 (1938); **James Estate**, 329 Pa. 273 (1938); **Orlady's Estate**, 336 Pa. 369 (1939); **In Re: Rhoades Estate**, 399 Pa. 476 (1960); **Torhan Will**, 9 Fiduc. Rep. 521 (1959), affirmed 401 Pa. 529; **Barone Estate**, 2 Fiduc. Rep. 149 (1950) (Washington County); **Brophy Estate**, 75 D. & C.2d 636 (1976); **Sovich Will**, 57 D. & C.2d 727 (1973).

At the conclusion of the initial hearing in this will contest, the proponent of the will sought to raise the question of the constitutionality of Section 2502(2) of the Probate Code. The contestants objected on the grounds the issue had not been raised by the pleadings.

Subsequently, the proponent moved to amend his answer to the caveat, claiming Section 2502(2) violates the equal protection and due process clause of the Constitution of the United States. The court has concluded that the amendment should be allowed, but finds no merit in the constitutional argument.

The thrust of the proponents constitutional argument is, that the right to transmit property by will is a basic and fundamental right, that the requirement of the Probate Code requiring subscription of the testator's name in his presence where signature is made by mark unreasonably deprives the testator of that right in violation of due process, and further that the statute unreasonably classifies and disqualifies some illiterates from making a valid will, and has no reasonable purpose in violation of equal protection.

Much of the proponent's testimony and brief is concerned with the study by the Bureau of Census of the United States Department of Commerce in November, 1969, relating to illiteracy in the United States. Proponent argues that the section of the Probate Code in question disqualifies some illiterate persons, and has a disproportionate impact on blacks and foreign born, because a larger percentage of blacks and foreign born are illiterate than native whites.

The decedent and proponent are not black; the statistics concerning the foreign born are not available after the year 1940, so the relevance of this testimony is not apparent. The same study further shows, there is a greater percentage of illiteracy among whites over 65 years of age than there is among negroes between 16 and 44 years of age, concludes that illiteracy is related not only to race, but also to age and sex, and that the percentage of illiteracy for all races has drastically declined.

The motives of the legislature are not a matter for judicial re-

view. See Note—Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, at 1091, et seq. But, in any case, there is no evidence that the Act was drawn with the intention of discriminating against the foreign born. Cf. **Com. v. Jones**, 452 Pa. 299 (1973). Indeed, Section 3135 of the Probate Code, 20 Pa. C.S.A. Sec. 3135, makes specific provision for the probate of wills in a foreign language.

Proponent also argues there are a large number of illiterates not protected by the statute, who are situated similarly; therefore the claim is under-inclusion of the group that should be protected. It is true that the proponent has offered two definitions of illiteracy, functional illiteracy, those with less than a fifth grade education, and illiteracy as defined by the Bureau of the Census in its study, inability to read and write a simple message in English or other language. However, it is certainly not unreasonable to conclude that a person, who was not able to affix his signature by reason of lack of education, was in need of greater protection than other persons that might be deemed illiterate.

The basic flaw in the entire illiteracy argument, however, is that the Act is not aimed at determining literacy or illiteracy. It classifies persons to (1) those able to sign their will, and (2) those unable to sign their will. The inability to sign may be for many reasons, physical, mental, psychological or emotional. In **Rosato's Estate**, 322 Pa. 229 (1936), the testator was completely literate, but signing his will made him so nervous that his hands shook, and he chose to sign by mark. The court held that it was completely within the discretion of the testator to decide whether he was able to affix his signature or chose to sign by mark. In **Zakatoff Will**, 367 Pa. 542 (1951), the testator again was illiterate, but able to sign his name only in Russian script. His decision to sign by mark was upheld. Further, any physical disability, either temporary or permanent, which would prevent the testator from affixing his signature would permit signature by mark, regardless of the literacy or illiteracy of the testator. The proponent's claim that the Act was only intended to protect a certain class of illiterates is not correct.

Proponent's claim that the right to make a will, or to transmit or receive property by will, is a property of natural right, is contrary to the great weight of authority, not only in the Commonwealth of Pennsylvania, but throughout the United States, with the

exception of the State of Wisconsin. 1 Bowe—Parker: Page on Wills, Sec. 3.1; **Note — The Unique Informality of Pennsylvania Requirements Attendant to the Execution of Wills**, 33 Temp. L. Q. 346 (1960).

It is purely a statutory right, subject to the control of the legislature. 2 Bowe—Parker: Page on Wills, Sec. 19.4 says this:

> "Since the legislature has the power to regulate the form of a will, and its validity in general, and since American states have adopted legislation which regulates the formalities of execution for both the will and the testament, which are now treated as one and covered by the same statutory provisions in every state, a will or testament which is not executed in compliance with such statutes is invalid. The provisions of the statute and not the original rules of ecclesiastical law nor of the common law determine the validity of the execution of the will. If the testator has not complied with the statutes which regulate the execution of the will, his intention to pass his property by will has no legal effect; and it will be ignored by the courts. On the other hand, a will is valid, as far as execution is concerned, if it complies with statute, although the courts may feel that the legislature would have acted more wisely in requiring other formalities . . .
>
> The purpose of these statutes is to make it certain that testator has a definite and complete intention to pass his property, and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another. The rules with reference to the execution of a will are the same in equity as at law.
>
> With respect to the formalities of execution, a will can only be either valid as complying with the statute, or void as in disregard of it."

The cases of **Trimble v. Gordon**, 97 S. Ct. 1459 (1977) and **Matter of the Estate of Cavill**, 459 Pa. 411, 329 A.2d 503 (1974) do not hold otherwise. In **Trimble**, the Supreme Court held that penalizing the right of an illegitimate child to inherit under an intestate statute, in effect, was visiting the sins of the parents on an innocent child and bore no reasonable relation to the promotion of the family unit.

In **Cavill**, the Supreme Court of Pennsylvania held that our state's "Mortmain statute" arbitrarily denied to charitable beneficiaries equal protection of the law. The underlying rationale of **Cavill** would appear to be that in a secular society, testators need more protection from greedy, distant relatives than they do from the American Cancer Society or an established church. **Casenote, Wills, Charitable Bequests & Devises**, 80 Dick. L. Rev. 152 (1975), **Note — In Re: Estate of Cavill**, 37 Pitt. L. Rev. 169 (1975).

However, if a state, by statute, grants the right to make a will, or to inherit property by intestacy, it cannot disqualify recipients on irrational grounds, without running afoul of the equal protection clause. See Bichrest v. School District of Philadelphia, 346 F. Supp. 249 (1972).

The requirement that the testator's signature by himself be in the presence of subscribing witnesses, and his signature by another must be in his presence, was required both by the statute of frauds, 29 Car. II, c.3, sec. 5, and by the statute of Victoria, upon which the American statutes are based. 2 Bowe-Parker: Page on Wills, Sec. 19.2

The history of the statute in Pennsylvania, insofar as signature by mark is concerned, is detailed in 2 Bowe-Parker: Page on Wills, sec. 19.51 and Bregy, Intestate, Wills and Estates Acts of 1947, sec. 2(2), paragraph 1, p. 2203, et seq. 1949.

Section 2502(2) of the Probate Estates and Fiduciaries Code adopts the language of the Wills Act of 1947, which according to the Commissioners Comments "is intended to eliminate arbitrary requirements without removing any of the essential safeguards." As pointed out by Bregy, Op. Cit., p. 2205, the Act of 1947 eliminates illogical distinctions and arbitrary provisions of the Act of 1917, but tightens up remaining requirements in several respects. Under Section 2 of the Act of 1917, the testator had to direct expressly that his name be subscribed and, even under the provisions of Section 3, it was necessary that the testator be present and at least impliedly authorize the subscription of his name. Thus, in James Estate, 329 Pa. 273, at 275 (1938), authorization was inferred from the making of the mark where the name was inscribed first, but if the name was subscribed after the mark was affixed, the court required that the subscription at least take place while the testator could see it for the implication of authorization to arise. See Hughes Estate, 286 Pa. 466, at 471 (1926).

Section 2502 of the present Act provides that if the testator is able to affix his signature, no subscribing witnesses are required to validate the will. This is a liberal provision. Note, 33 Temp. L. Q. 346, et seq. If, however, the signature is by mark or by another, additional requirements must be met. A signature by mark requires that the testator make his mark in the presence of two witnesses, who

sign their names to the will in the testator's presence. It also requires that testator's name be subscribed in his presence before or after he makes his mark. It is no longer required that his name be subscribed by his direction or authority. It is certainly not unreasonable for the legislature to require that the testator's name be placed on the will before his death, nor was it unreasonable for the legislature to require that where the mark was in lieu of the signature, the testator's name should be placed on the will by his direction and authority. Eliminating the requirement that his name be subscribed by his direction and authority liberalized the Act of 1917 and, in effect, mandated that the testator's presence, when his name was subscribed, was sufficient authorization.

Where the testator's signature is by another person, several further requirements must be met, i.e., his name must be subscribed in his presence and "by his express direction". The testator is required to publish the will in the presence of two witnesses, who sign their names to it in his presence.

Additional requirements were specified for nuncupative wills, which are no longer permitted.

The law has long required proper authentication of written documents, including proof of the signature of the person executing the same. Brown, Pennsylvania Evidence, p. 213.

This is particularly applicable in the case of a solemn document, such as a last will and testament, which takes effect after the death of the testator.

The proponent claims in his memorandum of law, page 26:

> "The doubt and uncertainty that the court is referring to is apparently related to a concern over the ability to identify a will as a will, and as a certain person's will. These concerns could be put to rest by a less restrictive requirement which would provide only that the names of the testator must appear at the end of a will, without the requirement that the name be written in the testator's presence."

Would this not permit the scrivener or some other person to add the testator's name, even after his death? The formalities surrounding the execution of wills is historically and properly a matter for the legislature. The requirement that a will signed by a mark must have

the testator's name subscribed in his presence is reasonably related to the notion that if the testator cannot affix his signature, in lieu of his signature, his mark will be accepted, provided his name is subscribed in his presence, as some indication of his authorization.

Further, as pointed out above, Section 2502 of the Probate Code in its entirety sets up a statutory scheme imposing additional requirements depending upon whether the will was signed by the testator, signed by mark, or signed by another.

It is by no means clear that it would be the legislative intention to permit signature by mark if this court were to hold that the requirement that the testator's name be subscribed in his presence was unconstitutional. The subsections of Section 2502, of the Probate Code are inseparably connected in the opinion of the court, and it cannot be presumed that the General Assembly would have enacted a provision deleting the phrase "in his presence, before or after he makes his mark" from Section 2502(2). Thus, even if the particular subsection is unconstitutional, the entire subsection should be deleted, in which event the subject will would be invalid. Cf. States Board of **Chiropractic Examiners v. Life Fellowship of Pennsylvania, 441 Pa. 293 (1971).**

It is not necessary to consider contestants' claim of undue influence.

ORDER OF COURT

The caveat of the contestants against the alleged will of Helen Jerokovitch, deceased, dated June 10, 1965, is sustained, and the alleged will is ruled invalid.

In view of the antagonism existing between the proponent and contestants, the Register of Wills is directed to grant letters of administration to a fit person, who is disinterested.

SAMUEL L. RODGERS, J.

Washington County Reports
OFFICIAL LEGAL PERIODICAL FOR WASHINGTON COUNTY, PA.

Vol. 60 THURSDAY, OCTOBER 4, 1979 No. 5

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DECEDENTS' ESTATES — WILLS — EXECUTION BY MARK — ADDITIONAL REQUIREMENT NAME BE SUBSCRIBED IN PRESENCE OF TESTATOR — CAVEAT FILED — CONSTITUTIONAL LAW — DUE PROCESS — WILL BASED ON STATUTORY, NOT NATURAL RIGHT — EQUAL PROTECTION — EXTRA PROTECTION FOR TESTATOR UNABLE TO SIGN NAME — REASONABLE CLASSIFICATION. ACT OF JUNE 30, 1972, P. L. 508, NO. 164, SEC. 2, AS AMENDED (20 PA. C.S.A. 2502(2)).

CONTAINING FOR TEMPORARY USE, ADVANCE SHEETS OF THE DECISIONS OF THE JUDGES OF THE 27th JUDICIAL DISTRICT OF PENNSYLVANIA AND THE OFFICIAL LEGAL NOTICES AND ADVERTISEMENTS OF THE SEVERAL COURTS OF THE COUNTY OF WASHINGTON, PENNSYLVANIA

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SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: ESTATE OF HELEN JEROKOVITCH, DECEASED

NO. 104 MARCH TERM, 1979

APPEAL OF: GEORGE JEROKOVITCH, JR.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF Washington County, Orphans'Court Div., be, and the same is hereby Affirmed. Each party pay own costs.

BY THE COURT:

Sally Mavros

Sally Mavros, Esquire
Prothonotary

Dated: April 11, 1980

Exhibit "B"

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

RE:

ESTATE OF HELEN JEROKOVITCH, DECEASED

APPEAL OF GEORGE JEROKOVITCH, JR.

No. 104 March Term 1979

Appeal from the Decree of the Court of Common Pleas of Washington County, Orphans' Court Division, at No. 63-77-243

Entered: July 24, 1979

OPINION

PER CURIAM:

FILED: APR 10 1980

Decree affirmed. Each party to pay own costs.

FILED
MAY 13, 1980

IN THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

WESTERN DISTRICT

IN RE:	)	
	)	
ESTATE OF HELEN JEROKOVITCH, Deceased	)	NO. 104 March Term, 1979
	)	
APPEAL OF: GEORGE JEROKOVITCH, JR.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that George Jerokovitch, Jr., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania affirming the judgment of the Court of Common Pleas of Washington County, Orphans' Division, which judgment was entered on April 11, 1980. This appeal is taken pursuant to 28 USC Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: All items in the transcript.

III. The following questions are presented by this appeal:

A. Does the requirement of 20 Pa. C.S.A. Section 2502 requiring that a testator who signs his name with a mark must have his name subscribed upon the Will in his presence violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

B. Is the due process clause of the Fourteenth Amendment of the Constitution of the United States violated by 20 Pa. C.S.A. Section 2502 because it creates an irrebuttable presumption that a testator's Will is invalid when his signature is not subscribed in his presence before or after the Will is signed by mark?

Exhibit "C"

C. Does the clause in 20 Pa. C.S.A. Section 2502 requiring that a testator's name be subscribed in his presence before or after he makes his mark when he signs his Will with a mark violate the due process clause of the Fourteenth Amendment to the Constitution of the United States because it is too vague and fails to put a testator on notice of its intended meaning?

SHIRE & BERGSTEIN

BY: _____

Bernard S. Shire, Attorney for
George Jerokovitch, Jr.,
Appellant
409 Schoonmaker Avenue
Monessen, Pennsylvania 15062

PROOF OF SERVICE

I, Bernard S. Shire, an attorney in the office of Messrs Shire & Bergstein, attorneys of record for George Jerokovitch, Jr., Appellant herein, deposes and says that on the 9 day of May, 1980, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Catherine Riccuiti and Margaret Roncadori, Appellees herein, by certified mail to the offices of Janet Moschetta, counsel of record for said Catherine Riccuiti and Margaret Roncadori, located at 78 East Beau Street, Washington, Pennsylvania 15301.

SHIRE & BERGSTEIN

BY: _____

SUBSCRIBED and sworn to before me, at the offices of Shire & Bergstein, 409 Schoonmaker Avenue, Monessen, Pennsylvania 15062 this 9 day of May, 1980.

_____
Notary Public

INEZ GLOTTY, Notary Public
Monessen, Westmoreland Co., Pa.
My Commission Expires June 12, 1983

PROOF OF SERVICE

I, BERNARD S. SHIRE, an attorney in the office of Messrs Shire & Bergstein, attorneys of record for George Jerokovitch, Jr., Appellant herein, deposes and says that on the 9 day of MAY, 1980, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Lawrence Barth, Deputy Attorney General, office of the Attorney G al, Eastern Regional Office, Room 206, State Office Building, Ph adelphia, Pennsylvania 19130 by Certified Mail - Addressee Only - Return Receipt Requested in the offices of the Attorney General, which office joined in the Brief of the Appellees, Catherine Riccuiti and Margaret Roncadori.

SHIRE & BERGSTEIN

BY: Bernard J. Shire

SUBSCRIBED and sworn to be fore me, at the offices of Shire & Bergstein, 409 Schoonmaker Avenue, Monessen, Pennsylvania 15062 this 9 day of MAY, 1980.

Inez Gilotty

Notary Public

INEZ GILOTTY, Notary Public
Monessen, Westmoreland Co., Pa.
My Commission Expires June 13, 1983

80-5065

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

IN RE:

ESTATE OF HELEN JEROKOVITCH, DECEASED

APPEAL OF GEORGE JEROKOVITCH, JR.

No. October Term, 1980

Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

MOTION FOR LEAVE TO
APPEAL IN FORMA PAUPERIS

TO THE HONORABLE, THE JUSTICES OF SAID COURT:

The Motion of Appellant George Jerokovitch, Jr. by his attorneys, Shire & Bergstein, respectfully represents:

1. Your Appellant is the proponent of a Will in the above captioned case.

2. Your Appellant has appealed to the Supreme Court of the United States from the Supreme Court of Pennsylvania the Judgment and Opinion dated April 11, 1980 by Notice of Appeal filed in the Clerk of Courts of the Supreme Court of Pennsylvania on May 9, 1980. Leave to proceed in forma pauperis was sought in the Court of Common Pleas of Washington County and was denied.

3. Because of Your Appellant's financial condition, he is unable to pay the costs of reproducing briefs and the filing fee. He supports the statement of the accompanying verified statement as to his financial condition.

WHEREFORE, Your Appellant prays Your Honorable Court grant him Motion to Proceed in Forma Pauperis pursuant to the Rules of the Supreme Court of the United States.

Respectfully submitted,

SHIRE & BERGSTEIN

BY: _____

Attorneys for George Jerokovitch, Jr.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

IN RE:	:	
	:	
ESTATE OF HELEN JEROKOVITCH, DECEASED	:	
	: No.	October Term, 1980
APPEAL OF GEORGE JEROKOVITCH, JR.	:	
	:	
	:	
	:	

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, GEORGE JEROKOVITCH, JR., being first duly sworn, depose and say that I am the Appellant, in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and that the nature of this action is that I am the proponent of my mother's will and I am defending it against a caveat which has been raised against it.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

No. I was last employed on June 17, 1975 and was paid at the rate of $1,191.66 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Over the past twelve months, I have received no income from a business, profession or other form of self-employment or in the form of rent payments, dividends, pensions, annuities, support payments or other sources aside from those listed below.

I received $250.00 for the sale of livestock over the past year. I received approximately $200.00 in interest payments on a Savings Account that I have. I receive $462.00 a month in Social Security benefits for myself and my wife.

3. Do you own any cash or checking or savings account?

I have approximately $500.00 in a checking account at First National Bank of Washington. I have approximately $4,000.00 in a Savings Account at the First National Bank of Washington. I have approximately $200.00 in cash.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

The only valuable properties that I own are:

(a) A house located on one-half acre of land in Centerville Borough, Washington County in which I reside containing five (5) rooms and a bath valued at approximately $25,000.00.

(b) A 1970 GMC pick-up truck valued at approximately $200.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I support my wife and myself with the income listed in paragraph 3.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

George Jerokovitch Jr.
George Jerokovitch, Jr.

SUBSCRIBED AND SWORN to before me this 10th day of January, 1980.

Inez Gilotty
NOTARY PUBLIC

INEZ GILOTTY, Notary Public
Monessen, Westmoreland Co., Pa.
My Commission Expires June 13, 1983